United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original w/ affidavit of mailing

75-1382

B P/S

To be argued by
THOMAS R. MAHER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1382

UNITED STATES OF AMERICA,

Appellee,

—against—

THOMAS MARTIN AUSTIN,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Appellant, Thomas Martin Austin, appeals from a judgment of the United States District Court for the Eastern District of New York (Weinstein, *J.*) entered on November 7, 1975 after a trial without a jury, which judgment convicted appellant of having failed to keep his local board advised of an address where mail would reach him in violation of Title 50 U.S.C. App. §§ 462(a), 465(b). Sentence was suspended and the appellant was placed on probation under the Youth Corrections Act (18 U.S.C. § 5010(a)).

Appellant was originally charged in a three count indictment with, (1) failure to comply with an induction order, (2) failure to comply with a pre-induction order, and (3) failure to keep his local board advised of an address where mail could reach him. Though the District Court held that the Government presented a

prima facie case on all three counts it nevertheless, upon a review of the evidence after trial dismissed counts one and two for failure to report for (1) induction and (2) pre-induction, with a view that actual receipt of the notice to report was not proven beyond a reasonable doubt. On this appeal, appellant claims that the evidence was insufficient to preclude a finding that he had notified the board of his address or that he had failed to so notify the board with the requisite criminal intent.

Statement of Facts

The selective service file of the appellant was admitted into evidence. It reveals that he was born on November 8, 1949 and registered with Local Board 64 in Jamaica, Queens. He advised the Board that his address was 115-46 144th Street, Jamaica, New York.

From 1968 through July of 1970 a number of notices were sent to him at that address. Only two were returned to the board, the rest were apparently received. The notice of classification providing him with a student deferment in March of 1968 was not returned. However a Current Information Questionnaire mailed to him on June 30, 1969 was returned with the written notation "Please return to sender—Receiver not at this address" (Government Exhibit 1A).

On July 14, 1969, the local board, in an attempt to verify his address wrote the person a Mrs. Chapman who the appellant designated would always know his address. Mrs. Chapman advised that the appellant's address remained unchanged. On July 16, 1969, because his student deferment had terminated, the board notified the appellant that he was classified 1-A. This notice of classification was not returned to the board. Nevertheless, when in October, 1969, the board ordered the appel-

lant to report for an Armed Forces Pre-Induction Physical Examination, the order was returned with the same notation as had been placed on the June Questionnaire "Return to Sender—Receiver not at this address" (Government Exhibit 1-B).

During this period of time, the lottery system became effective and the defendant's number, 97, required that he be processed toward induction.

The board again attempted to verify appellant's address through the person he had designated for this purpose and received no reply. It then issued another pre-induction order requiring the appellant to report for examination in June, 1970. This order was not returned. Appellant, however, failed to comply with the order. On July 16, 1970 an induction order issued and similarly it was neither returned to the board nor obeyed by appellant. Once more, the board again wrote Mrs. Chapman and the board received the advise that the appellant's address of 115-46 144th Street, Jamaica remained unchanged.

During the trial other selective service documents were admitted into evidence to show that the appellant was made aware of his duty to keep the board advised of an address where mail would reach him. These documents included; Government's Exhibit 2, a publication entitled "Selective Service And You" which was given to each registrant upon registering; Government Exhibit 3, a blank copy of a registration card (SSS Form 2) which was provided to the registrant and Government Exhibit 4 a blank copy of a notice of classification (SSS Form 110) which was provided to the appellant on two occasions.

In addition, the Classification Questionnaire (SSS Form 100) which was part of the selective service file in evidence and was completed and signed by the appellant

also bore the advise that he was obligated to keep the local board advised of an address where mail would reach him.

All of the foregoing permitted the Court to conclude that the appellant was aware of his duty to keep the local board advised of an address where mail would reach him (T. 70).

> "The Court: I find the duty was brought home to him, clear, given a card which told him what the duty was and all the papers indicated he was aware of that duty."
>
> * * * * *
>
> "The Court: I find beyond a reasonable doubt that the defendant was made aware of the fact that he had a duty to keep selective service board advised of the place where he would receive mail."

The sole witness at the trial was the appellant's mother, Mrs. Mary Austin who was called by the Government.[1] Mrs. Austin testified that she returned selective service material mailed to her son in June of 1969 and October 1969 (Government's Exhibit 1A and 1B referred to above) and that the "return to sender-receiver not at this address", notations were made by her (T. 28, 29). She further testified that during this period June 1969 to October 1969 that the appellant did not reside with her nor did she know where he was nor could she forward mail to him or contact him in any way (T. 28, 29, 32-33).

At the conclusion of this trial the appellant raised the same arguments presented in his brief on appeal with regard to the charge of failing to keep the local board advised of an address. In brief the appellant argued;

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[1] In the course of her direct testmiony the Court found her to be a "hostile witness in a technical sense" (T. 37).

(a) that he may have advised the board of a change in address but the board may not have recorded it, or had lost it due to some vandalism that occurred at the board (T. 55-59); (b) the Jamaica address was in fact a good address where mail could reach him as subsequent mail was not returned to the sender (T. 61-64), and, alternatively (c) there was no criminal intent involved with his failure to keep the Local Board advised of an address.

The Court rejected all three of these arguments for reasons that will be discussed, *infra*. Appellant was found guilty of having knowingly failed to comply with the affirmative duty of keeping the Local Board advised of an address where mail would reach him (T. 62, 63, 64, 67, 68). With regard to the charges of having failed to report for pre-induction and induction in 1970, the Court, though finding that the Government presented a prima facie case (based on the presumption of receipt as neither the second pre-induction order of June 1970 or the induction order of July 1970 were erturned to the sender), it nevertheless found the Government failed to prove beyond a reasonable doubt that appellant actually had received the orders as the mother's testimony as to what she did with these documents was ambiguous (T. 49, 50, 51).

ARGUMENT

POINT I

There was no evidence that the appellant provided the local board with a proper change of address.

Fundamental to any draft law is the requirement that the authorities who administer the law be able to communicate with those to whom the law applies.

Congress set forth in the Military Selective Service Act of 1967 (50 U.S.C. app. 465(b) that:

> "It shall be the duty of every registrant to keep his local board informed as to his current address and change in status as required by such rules and regulations as may be prescribed by the President."

This essential element of selective service was emphasized by the President in the regulations (32 CFR 1641.3 and 1641.7). In this case appellant's failure to keep the board advised of a proper address resulted in precisely the kind of evil which Congress intended to remedy; that is, because he had changed his address, the examination and induction notices were meaningless.

The duty to keep the local board advised of an address is complied with if the registrant provides the board with an address which one can reasonably expect would permit mail to reach him in time to comply. *Bartchy* v. *United States*, 319 U.S. 484 (1943); *United States* v. *Read*, 443 F.2d 842 (5th Cir. 1971); *United States* v. *Booth*, 454 F.2d 318 (6th Cir. 1972); *United States* v. *Burton*, 472 F.2d 757 (8th Cir. 1973).

In this case the sole address provided by appellant to the local board was that of 115-46 144th Street, Jamaica, New York.

Simply stated the appellant's argument is based on a reference in a report of the local board contained in the file that, at sometime, the board was subjected to vandalism and thus he speculates that perhaps he submitted a change of address and it was lost or vandalized at the local board. He offered no evidence as to when this vandalism took place nor did he present any information as to the extent of the vandalism all of which could have been obtained from the clerk of the local board who was available in Court on the morning of the trial but had returned to work as the appellant entered into a stipulation to receive the file into evidence.

Not only is appellant's argument sheer speculation, it is premised on a misreading of the document which referred to the vandalism.

The Delinquent Registrant Report (Appellant's Appendix E) was prepared by the local board on December 8, 1970 and forwarded to the United States Attorney to advise him that the appellant failed to comply with an induction order. The report also provides identification information such as address, weight and height, etc. that may assist in locating the subject. Most of this information is obtained from the selective service file which was submitted into evidence. However, the appellant improperly assumed that all the information came from the selective service file and since three items were missing with the notation "N/A due to vandalism at L.B.", he presumed that the selective service file was missing for a time or was subjected to vandalism.

The three missing items called for information on (1) other obvious physical characteristics, (2) date of registration, and (3) place of registration.

These three items are not normally obtained from the registrant's selective service file which was in evidence but from the registration card (SSS Form 1) which is completed by a registrar after meeting with the registrant (32 CFR 1613). Thus, any obvious physical characteristics would be noted by the registrar and entered onto the Registration Card (SSS Form 1). The date and place of registration was similarly entered on the Registration Card and it is obvious that this card, which is not part of the selective service file, and was separately maintained was subjected to vandalism and was not available when the Delinquent Registration Report was prepared nor was it available at the time of trial.[2]

Though the date of registration was also entered on the selective service file the place of registration and any obvious physical characteristics could only have been obtained from the Registration Card (SSS Form 1). Thus, the only conclusion that could be arrived at from these three entries on the report to the United States Attorney was that the Registration Card was not available due to vandalism. All the other information contained on the report (Appellant's Appendix Exh. E) such as height, weight, color of hair, social security number, etc., was obtained from the selective service file and leads to the conclusion that it was not missing or subjected to the vandalism as was speculatde upon by the appellant.

The District Court's finding that there was a lack of evidence to draw the inference that th appellant may

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[2] 32 CFR 1621.8 which was in effect at the time required that the Registration Card not be filed in the registrant's selective service file. It was to be separately filed. Section 1621.8 reads in pertinent part: ". . . Every paper pertaining to the registrant, *except his Registration Card (SSS Form 1)* . . . shall be filed in his Cover Sheet (SSS Form 101) . . ." emphasis added.

have informed the board of a change of address and that such information was lost due to vandalism should be upheld (T. 59-60).[3]

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[3] (T. 59, 60):

Mr. Berman: I'm not sure I made my argument clear. He may have sent in something and it may have been destroyed or misplaced.

The Court: You did make your argument clear.

* * * * *

I don't think there's sufficient evidence of that to warrant the inference. I'm not going to draw it.

* * * * *

Mr. Maher: . . . with regard to the vandalism the notation on the delinquency form (Appellant's Appendix E) saying that certain items are not available because of vandalism, those are items that appear on the registration card which is kept separate and apart from the selective service file.

Mr. Berman: We have no evidence of that in the record.

The Court: I don't find its necessary to make that determination. I'm rejecting that argument. I find beyond a reasonable doubt that that was the only address that he did give the selective service board.

Though there was no evidence offered to show that the Registration Card (SSS Form 1) was not contained in the selective service file, the regulations (32 CFR 1621.8) require that they not be filed together, and as all selective service forms are part of the regulations (32 CFR 1606.51) the contents of the Registration Card (SS Form 1) may be shown to bear information that was exclusive to it alone—i.e. physical characteristics of the registrant and place of registration.

POINT II

There was no evidence to warrant a finding that the appellant's failure to comply with the law was due to some inadvertence or innocent reason.

The evidence of appellant's failure to keep the board advised of his address which ultimately resulted in his failure to report for pre-induction and induction must be viewed on appeal in the light most favorable to the Government. *Glasser* v. *United States*, 315 U.S. 60, 82 (1942); *United States* v. *Munns*, 457 F.2d 271, 273 (9th Cir. 1972). All reasonable inferences tending to support the verdict of the trier of fact must be accepted. *United States* v. *Rauch*, 491 F.2d 552 (3rd Cir. 1974).

In regard to the question of the appellant's intent, there appears to be no dispute with Judge Weinstein's findings that the appellant was aware of his duty to keep the local board advised of an address where mail could reach him. Compare, *United States* v. *Lambert*, 355 U.S. 255 (1957). Nor is there any serious disagreement that the appellant in fact did fail to comply with this duty and thereby did not receive mail from selective service in time to comply.[4] Finally there is no dispute

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[4] The appellant, by way of a footnote on page 11 in his brief, is "reluctant to concede" that he was not in fact receiving mail through his mother by some of his infrequent contacts with her. And, although he properly states that the Court made no affirmative finding in this respect, it seems clear, given his noncompliance with the induction notices that they did not reach the appellant so that he could report on time as was required. *Bartchy* v. *United States*, *supra*, 319 U.S. at 489.

It is submitted that Judge Weinstein, though he found that the Government did not prove beyond a reasonable doubt *actual receipt* of the notices to report for pre-induction or induction, properly considered in passing on the appellant's intent, the fact that the induction and pre-induction orders were not returned

[Footnote continued on following page]

that the appellant did fail to report for the pre-induction physical and induction and thereby avoided military service, frustrating the law as it applied to him.

The argument raised by the appellant is that he lacked the necessary intent to commit the crime. However, unlike the cases he cites, *United States* v. *Neilson*, 471 F.2d 905 (9th Cir. 1973); *Graves* v. *United States*, 252 F.2d 878 (9th Cir. 1958) there was no affirmative evidence offered by appellant to offset the Court's finding that the appellant knew he had an obligation and he failed to comply with it.

In *Neilson, supra*, there was testimony from the defendant and his farther bearing on the question of intent that the Court decided should have been passed on by the jury as to whether the failure was due to mistake or accident. Similarly, in *Graves, supra*, there was testimony by the defendant and his mother that he was without knowledge of his duty to report as he had not received the induction order.

In virtually all instances wherein a prima facie case is presented and lack of intent is raised as a defense some evidence must be offered that the defendant was without knowledge or that the failure was due to mistake, inadvertence, coercion, or whatever may preclude one from acting or not acting voluntarily or deliberately.

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by the mother. He could reasonably conclude that the appellant was indifferent to mail arriving at his mother's house or recklessly indifferent to his obligations under the draft laws (T. 45).

> Court: I don't think she returned it all. I don't so read her testimony. I think she porbably gave him the mail that wasn't returned. She didn't look to be like the kind of woman who throws away official documents.
>
> She either gave it to him or threw it in the mail box with the return notation on it.
>
> In any event, the Government has made out a prima facie case on all counts."

Here, however, the appellant offered no evidence to counter the conclusion of guilt that was drawn from a failure to comply with an all important affirmative duty of which he was aware.

Moreover, the Government did not have to prove "bad purpose" or "evil nature" on the part of the appellant, *United States* v. *Couming*, 445 F.2d 555, (5th Cir. 1971). Nor did it have to prove that the appellant was hiding out, *United States* v. *Schwartz*, 366 F. Supp. 443, (E.D. Pa. 1973) citing *United States* v. *Wain*, 162 F.2d 60, (2d Cir. 1947). The degree of willfulness required for conviction varies with the offense charged. Chief Justice Taft is quoted in *Morissett* v. *United States*, 342 U.S. 246, 258 (1952) as declaring in *United States* v. *Balint*, 258 U.S. 251-252:

> "While the general rule at common law was that scienter was a necessary element in the indictment of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it . . . , there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement. It is a question of legislative intent to be construed by the Court . . . "

There can be no doubt that Congress imposed the affirmative duty for one to keep his local board advised of a current address (50 U.S.C. app 465(b) so that local board orders reach him in time for compliance.

It is clear from Mrs. Austin's testimony that the appellant left home. His reasons for doing so are unclear. No doubt the motivating factors were many and might well have included some consideration regarding

selective service as may be seen from Mrs. Austin's testimony.[5]

It is solely from the ambiguous testimony of Mrs. Austin as to the motivating forces for his leaving home that he argues that his failure with regard to selective service was due to mistake or inadvertence. Appellant also attempts to strengthen his case by referring to comments made at the time of sentencing (Br. at 13).

The "motivation argument" was rejected by the District Court. Moreover, appellant quotes only a portion of this rejection which was part of an exchange between the Court and the attorney for the appellant.

In addressing itself to the appellant's point that his failures were mere innocent neglect Judge Weinstein said (T. 68, 69):

> The Court: I have considered it. The failure might result from mistake, accident or some other innocent reason if, for example, he mailed a notice to the Board of a change of address but failed to put sufficient postage on it and under

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[5] (T. 30):

The Witness: I said maybe it was. I may sound foolish saying "maybe", but nevertheless, when a child leaves home with a misunderstanding—if I can put it the way it really is, when he leaves home with a misunderstanding —I guess he doesn't want contact and you have all sorts of different feeling about it.

The mother does, the child does too. It takes time for a child to get himself together to even contact home because of his pride, whatever might have come in between because you're thinking of one point of view about the service and I'm thinking of a personal or family life. I'm not thinking about this at all (indicating). That's really what was holding him away from home *as much as this* (indicating)", (emphasis added). The witness was referring to "this" case.

present regulations the post office never forwarded the mail.

That would be an attempt, failure due to neglect or innocent mistake or he might have told somebody else to do it and that person might have said that they did it or he might have thought that the mail at his home would be forwarded to him but he might have had some enemy or some person who destroyed the mail rather than forward it or to protect him or in order to harm him.

Each one of those cases he would have thought that he had fulfilled his duty but he would not have fulfilled his duty because of neglect or innocence. That's not the nature of the obligation here. The obligation is affirmatively to give notice to the Board and he failed to do that.

It doesn't make any difference what his motive is, which is what you're addressing yourself to?

* * * * *

He must have an intent to get in touch with Selective Service. There is an affirmative duty on him. I don't reach this case as going as far you suggest.

There's nothing in the record to suggest that this defendant had any thought whatsoever of selective service and I agree with you and I so find. His failure did not result so far as the record shows from any deliberate intent on his part to disrupt selective service from being in touch with him but he failed to give notice.

He knew he had the obligation to give notice and his failure *did not result from any inadvertance.* (emphasis added).

The Court was not, as the appellant attempts to set forth, stating that the violation was committed without criminal intent, but merely that there was neither a showing that the appellant had an evil motive or intent, nor, at the other end of the spectrum, that the failure was due to mistake or some innocent reason.

In sum, there was no direct evidence presented in the case as to why the appellant failed to comply with the law. Moreover, the mother's hearsay conjectures, conclusions and thoughts, were insufficient to lead to a finding that the failure were due to an innocent neglect or mistake; even if such neglect were a defense. The failure may have been caused by a complete indifference to ones duty to both his home and his country, which indifference, may ultimately have caused the appellant to forget about his duty which the Court indicated may have occurred, but it did not so find (T. 70). The Court, however, found that he was aware of his duty and failed to appropriately respond to it. Cf. *United States* v. *Trypac*, 136 F.2d 900 (2d Cir. 1943).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
THOMAS R. MAHER,
Assistant United States Attorneys,
of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 26th day of January 19 76 he served ~~a copy~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Jesse Berman, Esq.
351 Broadway
New York, N. Y. 10013

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
26th day of January 19 76

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977